

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Orion Power Midwest, L.P.

Docket Nos. ER06-993-000
ER06-993-001

ORDER CONDITIONALLY ACCEPTING TARIFF SHEETS

(Issued October 13, 2006)

1. On May 15, 2006, Orion Power MidWest, L.P. (Orion) submitted for filing pursuant to section 119 of PJM Interconnection, LLC's (PJM) Open Access Transmission Tariff (OATT)¹ and section 205 of the Federal Power Act (FPA),² tariff sheets (May 15 Filing) to implement cost of service recovery rates for the 244 megawatt combined cycle generating facility at its Brunot Island generating station (BI Facilities) located in Pennsylvania. In this order, the Commission accepts and suspends, for a nominal period, the tariff sheets for filing, effective May 16, 2006, subject to refund, and to the conditions discussed herein. The Commission grants waiver of the sixty-day prior notice requirement in section 205 of the FPA and section 35.3 of the Commission's regulations.³

Background

2. On December 2, 2005, Orion advised PJM, pursuant to part V of PJM's OATT,⁴ of its intention to deactivate the BI Facilities effective January 1, 2006, with the expectation that should market conditions prove economical, the BI Facilities would return to service for the summer of 2006. The BI Facilities were then deactivated in early

¹ *PJM Interconnection, LLC*, FERC Electric Tariff Sixth Revised Volume No. 1, Original Sheet No. 224I.

² 16 U.S.C. § 824d (2000).

³ 18 C.F.R. § 35.3 (2006).

⁴ *PJM Interconnection, LLC*, FERC Electric Tariff Sixth Revised Volume No. 1, Second Revised Sheet No. 224A. This tariff provision allows units that are planning to deactivate, but are deemed by PJM as needed for reliability, to propose cost-based recovery mechanisms.

January 2006. On March 3, 2006, PJM informed Orion that the BI Facilities would be needed for reliability at least through the summer of 2008, based on PJM's analysis of the projected reliability support requirements for its system and the availability of other units to meet these support requirements over the near term.⁵

3. Consequently, Orion proposes cost of service recovery rates for the BI Facilities, which consist of three combustion turbines (Units 2A, 2B, and 3) and one steam turbine (Unit 4). According to Orion, the capacity factors in 2005 for the BI Facilities were less than 1% for each unit. Orion states that it is not currently recovering its cost of service associated with the BI Facilities, and thus the cost of service recovery rates would provide sufficient cost recovery in order to continue operation of the BI Facilities for reliability services and to perform maintenance needed to maintain reliable operations.

4. Orion's proposed tariff provides for a monthly availability charge of \$1,972,086.25 to recover the estimated annualized costs of \$23,665,035 for operating the units for reliability services through September 1, 2008. Additionally, Orion's proposed tariff includes a monthly project investment tracker mechanism for the term of service to recover project investment costs that may be necessary to maintain operation of the BI Facilities. Despite its assertion that there are no planned capital additions for the BI Facilities, Orion proposes a mechanism that caps any such expenditure over the term to \$10 million. The tariff provides for a *pro rata* share of the project investments to be returned to customers if the BI Facilities continue to operate beyond the date when they are no longer needed for reliability.

5. Orion requests that the Commission waive the sixty-day prior notice requirement in section 205 of the FPA and requirements of section 35.3 of the Commission's regulations, permitting the tariff sheets to be effective May 16, 2006, subject to refund.

6. On July 13, 2006, the Commission issued a deficiency letter to Orion related to its May 15 Filing.⁶ Orion provided answers, along with supplemental materials, in its August 14, 2006 Response (August 14 Response).

Notice and Responsive Pleadings

7. Notice of Orion's initial filing was published in the *Federal Register*, 71 Fed. Reg. 30,909 (2006), with interventions, comments and protests due on or before June 5, 2006. Notice of Orion's August 14 Response was published in the *Federal Register*, 71 Fed. Reg. 51,599 (2006), with interventions, comments and protests due on or before

⁵ See May 15 Filing, Attachment A.

⁶ *Orion Power MidWest, LP*, Docket No. ER06-993-000 (July 13, 2006) (Unpublished Letter Order).

September 5, 2006. The Pennsylvania Office of Consumer Advocate, PJM Industrial Customer Coalition, and PJM filed motions to intervene out of time to the May 15 Filing. Duquesne Light Company (Duquesne) filed a protest to the May 15 Filing. Orion filed an answer to Duquesne's protest, and Duquesne filed an answer to Orion's answer. No comments or protests were filed in response to Orion's August 14 Response.

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceeding. Given the lack of undue prejudice or delay and the parties' interest, we find good cause to grant, under Rule 214, the unopposed, untimely motions to intervene in this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept Duquesne's and Orion's answers because they have provided information that assisted us in our decision-making process.

9. Duquesne's main argument in its protest to the May 15 Filing is that Orion should not be allowed to file a cost of service recovery tariff because Duquesne has a Connection and Site Agreement with Orion that requires Orion to give Duquesne two years' advance written notice of its intent to shut down a facility.⁷ Section 3.16 of the Connection and Site Agreement states:

Generating Company shall give Transmission Provider two (2) years' advance written notice of its intent to permanently retire or shut down the Facility. Such notice shall indicate the effect such permanent retirement or shut down will have on Transmission Provider's equipment on the Facility site or Transmission Provider's easements. In the event that Transmission Provider's equipment on the Facility site or Transmission Provider's easements will be unusable or incapable of operating pursuant to Good Utility Practice as a result of such permanent retirement or shut down, Generating Company shall pay Transmission Provider the reasonable costs of reconstructing such equipment and shall provide, at Generating Company's cost, a suitable alternative site accessible to Transmission Provider's substation for the relocation of Transmission Provider's equipment and easements.

Duquesne asserts that "the purpose of this notice is to provide Duquesne a reasonable amount of time to determine if Duquesne's equipment will be rendered unusable or incapable of operating... as a result of the shut down."⁸ Duquesne argues that if the

⁷ See August 14 Response, Attachment 1, *Connection and Site Agreement*, section 3.16.

⁸ Duquesne Protest at 3.

Commission accepts Orion's cost of service recovery tariff, it will have, in effect, allowed Orion to circumvent its advance notice responsibility to Duquesne under its Connection and Site Agreement.

10. In its answer to Duquesne's protest, Orion states that the Connection and Site Agreement only applies to decisions to "permanently retire or shutdown" a facility, not decisions to place a facility in mothball status, which is what Orion proposed in its December 2, 2005 communication with PJM. Duquesne responds, in its answer to Orion's answer, that the Connection and Site Agreement applies to decisions to either permanently shutdown or mothball a facility. Therefore, Duquesne argues that since the two years' notice was not given, the Deactivation Date that Orion proposed to PJM was inaccurate, and the instant filing is thus premature.

Commission Determination

11. The Commission accepts the proposed tariff sheets for filing, to become effective May 16, 2006, subject to refund and subject to the conditions discussed herein. The Commission disagrees with Duquesne's argument that Orion is not permitted to mothball the BI Facilities under its Connection and Site Agreement with Duquesne without giving two years' advance notice. Section 3.16 of the Connection and Site Agreement states:

Generating Company shall give Transmission Provider two (2) years' advance written notice of its intent to permanently retire or shut down the Facility.

12. The two-year notice required by this provision applies to permanently retiring or shutting down the facility, not mothballing the facility. In contrast to permanently retiring a unit, mothballing refers to removing the unit from operations for the present, but maintaining the unit in a physical state such that it could become operational at a future date.⁹ The provision of the Connection and Site Agreement refers only to permanent retirement or shut down. Mothballing a unit is not, by definition, permanent, because the unit remains in operable condition, and may be operated when market conditions improve.

13. The Connection and Site Agreement does not mandate that Orion operate the plant or generate electricity. It would not be reasonable to read the provision of the Connection and Site Agreement to prevent Orion from making a decision not to generate electricity for some period of time due to market conditions. As long as the plant and equipment are

⁹ See *PSEG Energy Resources & Trade, LLC*, 111 FERC ¶ 61,121 at P 2 n. 2 (2005).

in operating condition and have not been permanently shut down, the Commission finds no obligation to provide Duquesne with two years' advance notice that the plant will be mothballed.

14. The Commission rejects Orion's proposed monthly project investment tracker. Under part V of PJM's OATT,¹⁰ a generator has a choice of two compensation mechanisms if it elects not to deactivate (mothball)¹¹ upon notice from PJM that a facility is needed for reliability: (1) the generator may file a cost of service recovery rate with the Commission under section 205 to recover the entire cost of operating the unit beyond its proposed Deactivation Date¹² or (2) it may elect to receive a Deactivation Avoidable Cost Credit (DACC) pursuant to the formula contained in section 114 of the PJM OATT.¹³ Orion chose to file a cost of service recovery rate. Section 115 of the PJM OATT allows project investments to be recovered over the term of the tariff and limits the recovery of expenditures under this provision to \$2 million (under section 117 of the tariff, this limit is increased subject to independent third party verification of the need for additional project investment).

15. However, the project investment recovery formula in the PJM OATT is presented in the context of the DACC, which does not apply to the cost of service recovery rate Orion has filed here. Moreover, even if Orion had elected to file under the DACC formula, its request for \$10 million is outside of what is permitted by the PJM OATT formula rate.

16. In its proposal, Orion proposed a project investment cap of \$10 million. However, in its August 14 Response, Orion states that it "does not anticipate any project investments for the BI Facilities during the proposed term of the Cost-of-Service

¹⁰ See *PJM Interconnection, LLC*, 110 FERC ¶ 61,053 (2005), *order on reh'g*, 112 FERC ¶ 61,031 (2005). These orders approved PJM's deactivation policy in part V of the PJM OATT.

¹¹ Deactivation includes mothballing the unit. PJM OATT, section 113.1, *PJM Interconnection, LLC*, FERC Electric Tariff Sixth Revised Volume No. 1, First Revised Sheet No. 224A.

¹² The date a generating unit is either retired or mothballed and ceases to operate. *PJM Interconnection, LLC*, FERC Electric Tariff Sixth Revised Volume No. 1, First Revised Sheet No. 224A.

¹³ The formula for calculating the DACC includes a Deactivation Avoidable Cost Rate described in section 115 of the PJM OATT.

Tariff.”¹⁴ Since there appears to be no need for a project investment cap, we reject Orion’s proposal. Under cost-of-service rates, if future events trigger the need for such project investments, Orion may file under section 205 to collect these costs. Orion is directed to make a compliance filing, within 30 days of the date of this order, to remove the provision allowing it to collect up to \$10 million in unspecified project investments from its tariff.

17. Also, the Commission rejects Orion’s proposal to increase its Operation and Maintenance expense (O&M) by \$2,169,000 annually to account for various projects, including major inspections for Units 2A and 2B and a hot gas path inspection for Unit 3.¹⁵ Orion states that “Units 2A and 2B last received Major Inspections in 1981 and 1982” and that “although these units have historically run at low capacity factors, the time elapsed since their last major inspection exceeds typical turbine manufacturers’ and industry recommended inspection intervals.” Orion also explains that regarding Unit 3, “a hot gas path inspection is warranted in the spring of 2008 based on typical turbine manufacturers’ and industry-recommended inspection intervals.”¹⁶ The Commission finds that these are extraordinary maintenance expenses, and Orion has provided no support that the costs for these projects will actually be incurred during the effective period of these rates, or that it has accurately calculated these costs. Orion is directed to make a compliance filing, within 30 days of the date of the order, to remove the annual cost of \$2,169,000 from O&M, without prejudice to Orion making a section 205 filing to collect for these projects when it has determined known and specific costs.

18. Orion requests the Commission grant waiver of its sixty-day prior notice requirement and place its proposed rates into effect on May 16, 2006. The Commission has granted waiver where: (1) agreements are intended to permit a generator needed to assure system reliability to operate; (2) the applicant may only learn upon very short notice which units will be needed for reliability; and (3) the applicant may not be able to file 60 days prior to the commencement of service due to short notice.¹⁷ PJM notified

¹⁴ See *PSEG Energy Resources and Trade, LLC*, 113 FERC ¶ 61,213 (2005). This order approved a settlement regarding a similar cost of service recovery tariff, including a monthly project investment tracker cap of \$15.6 million. However, unlike Orion, PSEG identified specific project investments.

¹⁵ See May 15 Filing, Attachment C, Schedule No. 3.

¹⁶ See August 14 Response at Response No. 9.

¹⁷ See *Mirant Americas Energy Marketing, LP*, 109 FERC ¶ 61,227 at P 14-16 (2003). See also *Milford Power Company, LLC*, 110 FERC ¶ 61,299 at P 25 (2005).

Orion of its reliability determination on March 3, 2006, and Orion filed its cost of service recovery tariff on May 15, 2006. In this circumstance, we find good cause to grant waiver of the sixty-day prior notice requirement.

19. Finally, the Commission grants Orion's request for waiver of the requirements of Part 35 of the Commission's regulations.

The Commission orders:

(A) The tariff sheets are accepted, effective May 16, 2006, subject to refund and to the conditions discussed in the body of the order.

(B) The Commission grants waiver of the sixty-day prior notice requirement in section 205 of the Federal Power Act (FPA) and section 35.3 of the Commission's regulations.

(C) Orion is hereby directed to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.